

To: Gloria Chen
Damian R. LaPlaca, Esq.

From: Kevin F. Penders, Hearing Officer

Date: February 19, 2002

Re: Chen v. Qwest Communications, D.T.E. 99-61-6

HEARING OFFICER'S RULING

I. INTRODUCTION

On June 22, 1999, Gloria Chen ("Complainant"), pursuant to G.L. c. 93, § 108 et seq., filed a complaint with the Department of Telecommunications and Energy ("Department") alleging that Qwest Communications, Inc. ("Qwest" or "Company") switched her long distance telephone service without authorization. On October 6, 1999, pursuant to notice duly issued, the Department conducted an evidentiary hearing. Ms. Chen testified on her own behalf. The Company sponsored the testimony of Maria Bertacchi, a customer service representative. On December 10, 1999, the Company filed a Motion to Dismiss ("Motion") the case claiming that the Department failed to issue an opinion within the statutorily-imposed deadline.

II. MOTION TO DISMISS

A. Qwest's Position

Qwest argues that pursuant to G.L. c. 93, §110(j), the Department is compelled to dismiss Ms. Chen's complaint (Motion at 1). Qwest asserts that the Department closed the record at the close of the hearing on October 6, 1999 (id.). Qwest argues that by failing to issue an order within ten days of October 6, 1999, the Department violated the plain language of the statute, which states, in pertinent part that, "[W]ithin ten business days after the hearing the department shall render its decision." G.L. c. 93, §110 (j). Qwest asserts that the legislative use of the word "shall" denotes that the Department had a mandatory obligation to issue its decision within 10 business days, by October 20, 1999 (id. at 2).

In support of its Motion, Qwest relies on Commonwealth v. Cook, 426 Mass. 174, 181 (1997), where the court upheld a motion to dismiss a criminal indictment because the Massachusetts Office of Campaign and Political Finance (“OCPF”) did not timely notify an individual that he was being investigated and could request a hearing (Motion at 1-2). Qwest also relies on Department precedent wherein we have determined that, “the Department cannot ignore the plain language of the Act, particularly when the Act is detailed and precise.” Id. at 2, citing, Commonwealth Electric Light Company, D.P.U./D.T.E. 97-111 at 73 (February 27, 1998).

B. Analysis and Findings

The Company raises the question of whether the Department’s failure to issue a decision by October 20, 1999 compels dismissal of the case. The Hearing Officer notes that the Supreme Judicial Court has held that where deadlines are not crucial to the purpose of the statute, and merely provide for the orderly and convenient conduct of public employees, compliance with statutory time requirements is not a condition precedent to the validity of the act to be done. See e.g., The Children’s Hospital Corporation. v. Rate Setting Commission, 410 Mass. 66, 74 (1991).

In The Children’s Hospital Corporation v. Rate Setting Commission, the court upheld a decision of the Rate Setting Commission even though it did not issue its decision within the 180-day timeline mandated by the statute. Id. at 67, 74. The court reasoned that where a statutory mandate “relates only to the time of performance of a duty by a public officer and does not go to the essence of the thing to be done, it is only a regulation for the orderly and convenient conduct of public business and not condition precedent to the validity of the act to be done.” Id. at 74. See also, Anthony Monico’s Case, 350 Mass. 183, 185 (1966) (where the court upheld the Industrial Accident Board’s decision even though it was issued after the statutory deadline).

Moreover, when determining what effect failure to comply with deadlines should have on the decision rendered by an agency, courts have been unwilling to frustrate the greater purposes of a statute by judicially construing remedies not present in the statute. See e.g., Brian A. Zuckerman v. Zoning Board of Appeals of Greenfield, 394 Mass. 663, 666 (1985) (where the court held that the Town of Greenfield’s Zoning Board of Appeals’ failure to file its decision within the statutorily-required 14 days did not result in a constructive grant of the appeal since such a remedy was not addressed in the statute).

Statutory intervals for administrative action should always be taken with gravity. However, the courts have affirmed regulatory decisions when the failure of a public official to meet a statutory deadline relates to the time of the performance and not to the essence of the “thing to be done.” See Children’s Hospital, 410 Mass. at 74. Here, a purpose of the statute is to protect consumers from having their telephone service switched without authorization,

and to ensure that all parties are notified (in a manner timely enough to prevent impairment of either prosecution or defense of a claim because the trail of evidence has gone cold) of the Department's investigation and given an opportunity to present their case at an evidentiary hearing, as well as to provide the consumer with a reasonable expectation that their complaint will be addressed in a timely and orderly fashion. Qwest, the alleged violator of the statute, has suffered no prejudice in the Department's delay. As a result, I find that non-compliance with the ten-day statutory deadline to issue the Department's final order in this matter does not compel dismissal of the case. See Anthony Monico's Case, 350 Mass. at 185-186. Given that the purpose of the statute is to protect consumers from the unauthorized switch of their telephone service providers, I find it unlikely that the legislature intended to remedy an agency violation of a statutory time deadline with dismissal of the complainant's case.

Further, Qwest's reliance on Commonwealth v. Cook is misplaced. In Commonwealth v. Cook, the court stated that the defendant suffered "irremediable harm" as a result of the agency's failure to timely notify an individual that his actions were being investigated and that he was entitled to a hearing on the merits of the case against him. 426 Mass. at 178-179. Because the investigation was conducted without the defendant's statutorily-mandated participation, the defendant was ultimately indicted. Id. at 176. The court stated that the statutory timeline was necessary to protect individuals from having to endure unwarranted trials. Id. at 181. Moreover, the court distinguished this statutory deadline from those that relate to the time in which an agency must perform an administrative function or where the statute does not "deprive the agency of its power to act" in the event that the established deadline is not met. Id. at 180. Another critical distinction is that here we deal with a marketplace complaint, whereas in Commonwealth v. Cook, the appellee faced a criminal sanction. In the former case, statutory construction safeguards a criminal defendant from a dilatory prosecutor. In the latter case, the statute extends an administrative remedy to redress grievances of individual consumers in what may well be an already imbalanced commercial relationship. Liberal construction of such a remedy is warranted to effect its protective purposes and to prevent its trivialization by subjecting it to the common-law-pleading construction that Qwest urges upon the Department.

Similarly, Qwest's reliance on Commonwealth Electric Light Company, D.P.U./D.T.E. 97-111 is inappropriate. The statute followed by the Department in that case detailed how to calculate a company's return on equity. See G.L. c. 164, § 1E. In the instant matter, the statute identifies an interval within which the Department is directed to notify a company that a complaint has been filed against it.

Accordingly, Qwest's Motion to Dismiss is denied.

IV. Appeal

Under the provision of 220 C.M.R. §1.06(6)(d)(3), any aggrieved party may appeal this Ruling to the Commission by filing a written appeal with supporting documentation by February 21, 2002. A copy of this Ruling must accompany any appeal. A response to any appeal must be filed with the Department by February 28, 2002. Any appeal should be submitted to: Mary L. Cottrell, Secretary, Department of Telecommunications and Energy, One South Station, Boston, MA 02110.

Kevin F. Penders, Hearing Officer